IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE S. COHLMIA, JR., M.D., and CARDIOVASCULAR SURGICAL SPECIALISTS CORP., an OKLAHOMA CORPORATION, Plaintiffs,	)	
V.	)	No. 05-CV-384-GKF-PJC
ARDENT HEALTH SERVICES, LLC a Delaware limited liability company, et al., Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON FEBRUARY 12, 2009

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

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PROCEEDINGS

February 12, 2009

THE COURT: Be seated, please.

THE CLERK: We're here in the matter of George S. Cohlmia, Jr., et al. vs. Ardent Health Services, LLC, et al., Case Number 05-CV-384-GKF. Will the parties please enter their appearance.

MR. BREWSTER: Your Honor, on behalf of the plaintiffs, Clark Brewster, Michael Barkett. And with us is a new lawyer that just joined our firm from New Hampshire, Darla Sedgwick, who has made all the filings, but has not been sworn in, Your Honor.

THE COURT: Very well. I understand that she has paid

the fee and is in good standing; is that correct?

MR. BREWSTER: That's correct.

MS. SEDGWICK: Yes, Your Honor.

THE COURT: Very well, Ms. Sedgwick, for the purposes of this case, you are admitted pro hac vice. And I understand you are waiting to be sworn in to the district; is that correct?

MS. SEDGWICK: Correct, Your Honor.

THE COURT: Welcome.

MS. SEDGWICK: Thank you.

THE COURT: How long have you practiced in New Hampshire?

MS. SEDGWICK: Fifteen years.

THE COURT: Good. Where?

MS. SEDGWICK: I was practicing in Manchester, but pretty much all over the state, but my office was in Manchester.

THE COURT: Great. In the plaintiffs' area or --

MS. SEDGWICK: In various civil arenas and criminal as well.

THE COURT: Good. Good. Well, you know Paul Barbadoro.

MS. SEDGWICK: Yes, I do.

THE COURT: He was one of my two mentor judges in baby judges school and I'll tell you what, he is one tremendous judge.

MS. SEDGWICK: He is.

THE COURT: He truly is.

MS. SEDGWICK: He's an icon there.

THE COURT: Well, he is. He is. For those of you who don't know, he was the judge who handled Tyco. He was also Warren Rudman's right hand. And he has some good stories about David Boren and the Senate Intelligence Committee and Sven Holmes who was there in senate intelligence about the same time and so he has some good senate war stories. But I tell you what, he is the best of the best.

Well, welcome to this court.

MS. SEDGWICK: Thank you very much.

THE COURT: Apparently you will need to file an entry of appearance in this case.

MS. SEDGWICK: Yes.

MR. LEWIS: For St. John's Medical Center, Dr. Allred, Dr. Burnett, Michael Lewis, Bill Spitler and Jim Connor.

MR. CARWILE: For the Oklahoma Heart Institute and Dr. Wayne Leimbach, John Carwile and Jamie Rogers.

THE COURT: Very well. Well, let's attack the lower-numbered motion first. I believe, Mr. Lewis, will you be taking the laboring oar there?

MR. LEWIS: Yes, I will, Your Honor.

THE COURT: Very well, you may proceed.

MR. LEWIS: Thank you. As a result of the rulings of

the Court earlier, what we have today before the Court is a motion for summary judgment by St. John's Medical Center, Dr. Burnett, and Dr. Allred with regard to the plaintiffs' claim for tortious interference with a contract. The motion for summary judgment which we filed along with the reply and the response raised this question: What evidence is there that plaintiffs were damaged by the action at St. John of removing Dr. Cohlmia's privileges? That's the question to me. The principal question is what evidence is there that he was harmed in any way, because if he wasn't harmed, then he has no claim or cause of action.

The facts, you know them well, Dr. Cohlmia was a cardiovascular thoracic surgeon. He was suspended on July 8, 2003, at St. John Medical Center after two surgeries on June 6, one of which resulted in death and one of which resulted in the maiming of a patient. This went through the normal procedures at St. John, a hearing presided over by former Judge Brett. It was appealed to the Medical Executive Committee, affirmed, appealed to the board of directors and affirmed all under the St. John bylaws, medical staff bylaws. The basis from St. John's standpoint of the action taken against Dr. Cohlmia was patient safety.

At the time of his suspension on July 8, 2003, and it's important to this case, that Dr. Cohlmia still had privileges to do surgery at Hillcrest Medical Center, Saint

Francis Hospital, SouthCrest Hospital and a couple of other smaller hospitals that he at that point had privileges. So he had a place to take patients, a place to do his surgeries. The claim for tortious interference by Dr. Cohlmia --

THE COURT: Explain to me --

MR. LEWIS: I'm sorry.

THE COURT: The plaintiffs' materials indicated in the portion -- the three-page portion, Exhibit 20 here which was unverified, unsigned talked about the plaintiff only having privileges after being denied privileges at St. John and Hillcrest, at Tahlequah. I was trying to reconcile that with your contention that he continued to have privileges at SouthCrest and et cetera.

MR. LEWIS: Well, the privileges at Hillcrest actually were not removed or terminated until after the lawsuit was filed. So the lawsuit was filed in July 2006. At that point he still had privileges at Hillcrest. This is three years after he was suspended at St. John. He had privileges at SouthCrest as well and those were eventually removed by some kind of an agreement. He also had privileges at Saint Francis. When he came up, I can't tell you the date of this, but at some point after 2003, he came up for reappointment which is usually every two years at these hospitals. He came up for reappointment and he simply withdrew his application for reappointment. He was never suspended or his privileges terminated as far as I know

at either SouthCrest or Saint Frances. He simply withdrew his privileges, moved his practice to Tahlequah, and he is practicing there today. I don't recall whether he has privileges anyplace else, but I think Tahlequah may be the only place now. That took place over a period of years.

We're talking about whether or not an act by St. John interfered with his contract rights. In the claim for tortious interference in the contract, there are number of contracts that are listed in the complaint. A contract with patients, patient referral sources, hospitals, clinics, Native American authorities, insurance companies, third party payment sources, participation agreements, I'm not sure what those are. In his deposition he was asked what contracts were interfered with and at that time he identified a few: Hillcrest Managed Care, Blue Lincs, Aetna, Community Care, Cherokee Nation, Blue Cross Blue Shield, PLICO and his patients. In the response to St. John's motion for summary judgment, on the other hand, he listed only patient contracts, Cherokee Nation, Blue Cross Blue Shield and Specialty Hospital. That is the damages arise from the fact that he -- from prospective business advantage and that he claims that his termination privileges at St. John or suspension privileges resulted in him not being able to open his specialty hospital.

So as far as we're concerned, those are the contracts that are in play here today. I would point out to the Court

that not a single one of those contracts is attached to the plaintiffs' materials in this case. There are no contracts attached to the record for Your Honor to see or for the appellate court to see.

THE COURT: All right. Just to make sure that I'm tracking with you, you've got patients, Cherokee Nation, Blue Cross Blue Shield.

MR. LEWIS: And the claim of, I think the claim of prospective business advantage, loss of business advantage goes to the loss of the specialty hospital and they also cover patients who didn't actually have a contract with Dr. Cohlmia.

THE COURT: All right.

MR. LEWIS: So patients out there who might use him in the future and he wasn't -- and weren't able to because of the actions of St. John.

THE COURT: All right.

MR. LEWIS: Essential elements of tortious interference, in this case we have the law of the case. Judge Payne entered an order on August 9, 2006, setting forth the three essential elements of tortious interference which are now the law of the case. Plaintiff had a business or contractual right that was interfered with. The interference was wrongful and malicious and not justified, privileged, or excusable. And the interference proximately caused his damages. And my remarks today, while I would like to briefly talk about malice

and some of the issues like that, my remarks primarily will go to the issue of proximate causation of damages.

Plaintiffs have cited the Applied Genetics Tenth Circuit case on the issue of summary judgment responsibility. I would point out that that case also says importantly, the nonmoving party may not rest on its pleadings, but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive issues for which it carries the burden of proof. That's the Celotex case which Your Honor is very familiar. So what we have to look at today, has the nonmoving party come forward with specific facts that are shown by affidavit or verification or from depositions or from written discovery which demonstrate that there was some loss or damage caused by the suspension of privileges at St. John.

First, I want to point out that there is but one act of interference alleged as to St. John here, and I think there's no question about this, and that is the suspension of privileges. There is no evidence or allegation supported by any evidence in this case that the St. John defendants -- and today, Your Honor, I'd appreciate it if when I refer to St. John, we understand I'm referring to Dr. Burnett and Dr. Allred. Dr. Allred was the vice president of medical affairs. Dr. Burnett was the incoming president of medical staff. And they are defendants in this case and when I say St. John, I mean them as well.

There is no evidence or allegation supported by any evidence that these St. John defendants independently communicated with any third party, with any insurance company, with any patient of Dr. Cohlmia, or with any other person that was involved in his hospital -- Heart Hospital idea. There was no direct communication. There's no evidence of that in the case. So the case is unique in Oklahoma adjudicative history in that the alleged interference arises solely from his suspension from St. John surgical privilege suspension. That would be like a restaurant suing the state health -- or the county health department that shut down the restaurant claiming that it interfered with their contracts with their vendors, their customers, their lenders, that sort of thing. I find no case in Oklahoma in which this cause of action was used in that context.

The simplest way we believe to dispose of the plaintiffs' tortious interference claim is by focusing on the causation issue. Because the defendants, while they have made claims of the effect this suspension had on a broad range of contracts, they have, in fact, not presented any evidence at all of any causation or any actual damage. As I said earlier, there are no contracts attached to the plaintiffs' response. They didn't attach the Blue Cross Blue Shield contract. They attached no evidence from any patient like an affidavit or a statement. They took no depositions of patients. They took no

depositions of referring physicians. There are no contracts from the Cherokee Nation attached. There are no contracts from any of the Indian tribes that Dr. Cohlmia serves.

Let's look at the categories of damage alleged, specifically the patient contracts. As you know, under -- and I don't want to make a big point of this, but under 15 O.S. Section 1, contracts are defined as requiring offer, acceptance, and consideration. That's first year law school. The only patients in my view who would qualify as being a contract that could be interfered with were those who had actually engaged Dr. Cohlmia to perform services. I know that he has a lot of people who, sitting in their dens at home, think if I have a heart problem, I want Dr. Cohlmia to be my surgeon, but there's no contract involved in that. It's just an expectancy of some kind. The patient may die of something else. The patient may never have a heart problem. So we see no contracts there.

But there would have been patients that had, at the time of the suspension, engaged Dr. Cohlmia to perform clinical services or surgical services. There is no evidence from any of these people, none saying I was supposed to have surgery on the 9th and I wasn't able to and I had to go someplace else and I was -- there is just simply no evidence that any of these patients' contracts with Dr. Cohlmia were interfered with. And without evidence, even if it might be logical that they were

interfered with, it doesn't matter. Under the rules, there has to be evidence. And we point out also that at the time of the suspension, they've agreed with us that he had -- or we have one of our statements of fact that he had privileges at Hillcrest Medical Center, Saint Francis and SouthCrest, all of which were places where he could perform thoracic or cardiovascular surgery.

Secondly, the health insurance plans. Of course, Dr. Cohlmia had contracts with various health insurers and those have been listed in some of the pleadings. In the response to St. John's motion for summary judgment, they mentioned only the Blue Cross Blue Shield contract and said that that was interfered with, that there was some point in time, it's not exactly clear at what point in time, but Blue Cross Blue Shield indicated that they might not renew it. Dr. Cohlmia appealed that and Blue Cross Blue Shield backed down and he continued to be insured. So the issue then is how is it that the suspension of privileges at St. John resulted in some kind of damage to Dr. Cohlmia --

THE COURT: Any idea why --

MR. LEWIS: -- or their patients that he lost -- sorry.

THE COURT: Any evidence as to why Blue Cross Blue Shield initially declined to renew the contract?

MR. LEWIS: Well, at some point in time after the

suspension, he was -- he got a letter from Blue Cross Blue Shield, and this is in the speaking papers, that they were not going to renew him. And he appealed that, which he has a right to do, and Blue Cross Blue Shield heard the appeal and decided that he would continue to be a provider. And he is a provider for them today as far as I'm concerned.

THE COURT: What damages did that interruption cause?

MR. LEWIS: Well, theoretically it could have caused patients who had only Blue Cross Blue Shield insurance and did not -- and you know, they might have not been able to use Dr. Cohlmia's services. There's just no evidence of that. There's not an affidavit from a patient saying I had Blue Cross Blue Shield and for the four months he was appealing that, I wasn't able to get my surgery and had to use another doctor. There's no evidence of it. So we have no evidence of causation of damages with regard to the Blue Cross Blue Shield contract. Again, for purposes of this argument we're assuming that this is the only one of the elements of the cause of action that we're dealing with.

It's possible, for example, that that information could have been obtained from Blue Cross Blue Shield by taking the deposition of a Blue Cross and Blue Shield agent or an employee that would have information about what patients' claims were denied during that period of time that involved Dr. Cohlmia. There's no evidence of that. There's no discovery

conducted of Blue Cross Blue Shield. There's no affidavit from them. There's absolutely no evidence in the record that he was affected in any way as a result of Blue Cross Blue Shield initially denying his reinstatement -- or his contract and then reinstating it.

Another group in issue are what we call third party providers which are really the tribal authorities. Each of the tribes has some kind of medical plan that their tribe members can subscribe to. And what happens is these tribes then enter into contracts with hospitals and doctors and with other providers to provide that at a certain cost just like the insurance companies do. So Dr. Cohlmia has contended in this case -- and the only one he mentions is the Cherokee Nation which is one of his primary contracts. He says that the suspension of him at St. John interfered with that contract. Yet the depositions were taken of the individuals who were functionaries, administrators within the Cherokee Nation insurance plan and all agreed that he never lost his Cherokee contracts. He always had it. Now, certainly if a patient wanted to have surgery at St. John and wanted Dr. Cohlmia to do the surgery, he would not have been able to do that. He would have had to do the surgery someplace else, but there's no evidence of that. There's no evidence that ever happened. There's no evidence that a patient said to the Cherokee Nation I want to go to St. John and I want Dr. Cohlmia and the

Cherokee Nation had to say no, just no evidence. So we have no evidence of interference with that Cherokee Nation contract as a result of his suspension.

The fourth area that we have to deal with is the Heart Hospital and this was -- it's a complicated thing and I don't want to inject too much into it other than what both sides have put in the pleadings. But Dr. Cohlmia had an idea to form an independent specialty hospital to do cardiovascular surgery and it would involve cardiologists and so forth. He in, I think, September 2002, had a series of meetings, promotional meetings at which he attempted to get doctors and cardiologists and other surgeons to participate with him in this hospital to make investments in it. As far as we know, no doctor, no person ever invested any money at all in his Heart Hospital. After he began this effort to form the Heart Hospital -- and again, this is a year or so -- a year before the suspension, Saint Francis decided to build a heart hospital. And Dr. Cohlmia had gone so far as to get an option on a piece of property out in South Tulsa. The Saint Francis Heart Hospital was just a mile from that piece of property. And the doctors, CV surgeons, the cardiologists all decided to go with Saint Francis.

And by January of 2003, six months before the suspension, the Heart Hospital of Dr. Cohlmia was essentially dead. There was no further effort. There was never any investment made. But the concept that he has in this case with

regard to intentional interference is that this was a prospective business advantage for him, that he would have built this hospital and that the suspension by St. John prevented him from doing that.

So we have to look to see what is the evidence of that? What is the evidence that anything that had to do with the promotion of his Heart Hospital was affected by the suspension at St. John. There simply is no evidence. There's no evidence from potential investors, from other cardiologists, from other CV surgeons. There's no affidavits or evidence of any -- deposition evidence of any other person that says the reason I did not invest in his hospital or the reason this hospital failed was because St. John suspended his privileges. Now, Dr. Cohlmia says that, of course, in his head that he believes that that had some impact on his ability with the hospital. He doesn't concede that the hospital was dead in January of 2003. But my point is we're here on summary judgment today before the Court. And the Court has to look in this stuff and say where is the evidence that this Heart Hospital was affected in any way. And there is no evidence. There's simply no evidence, no affidavits, no depositions, no evidence.

Now, I take it back, there are three items of evidence on the Heart Hospital that were tendered by the plaintiffs, not in the nature of the things that I mentioned to you, but these

are facts that are substantiated and tendered to the Court. These three are, first, that Dr. Burnett, one of the defendants who is a cardiologist, attended by invitation a promotional meeting for this Heart Hospital in September of 2002. Attended the meeting. He was asked questions about it. He said I went, I wasn't interested. Second, that St. John Medical Center's president David Pynn testified that at some point in time he recommended that St. John develop a comprehensive cardiovascular services program because he was concerned and people at St. John were concerned about Saint Francis' plan to build a heart hospital. They felt this would give Saint Francis some competitive advantage and they felt like -- Mr. Pen testified and this is presented by the plaintiffs in this case to you, he testified St. John looked at this and was concerned about it because of Saint Francis. Mr. Pen didn't even know about Dr. Cohlmia's hospital. Dr. Cohlmia was primarily a Hillcrest physician and Mr. Pen said we were concerned about Saint Francis. That's the second piece of evidence that's tendered in support of their claim.

The third piece is about a 7-page document which came up in the electronic search of our records at St. John which appears to be the notes of some kind of marketing meeting inside St. John's cardiovascular institute where people are sitting down and talking about how are we going to market, how are we going to meet competition. And in those notes, there is

a statement that somebody, unidentified, expressed concern about increased competition from a Hillcrest Heart Pavilion which as now been built and the Saint Francis Heart Hospital. No mention of Dr. Cohlmia, no mention of his Heart Hospital in that document at all.

Those are the three pieces of evidence. And we submit that those are wholly inadequate to permit the Court to make a finding that the suspension of Dr. Cohlmia at St. John resulted in the loss of his Heart Hospital or loss of his business opportunity. The -- in fact, those three pieces of evidence show no more than that St. John was legitimately concerned about their position in the marketplace and that they were looking to take steps to improve their own program. Nothing about let's get in touch with people out there and tell them that Dr. Cohlmia is a bad man. There was never any mention of that anyplace and there's no evidence of that.

So with regard to all these alleged items of damages, in summary the plaintiffs have simply failed to produce any competent, admissible evidence that the cause of his losses contractual and advantage-wise were affected in any way by the St. John's suspension.

I want to make a couple of brief comments about the fact of damage, whether there is or isn't any damage at all. That's a different matter than causation of damages. Did he have damage? Well, again, we don't know because there's no

competent evidence of record that shows that he was damaged in any way with regard to these contracts, patient contracts, insurance contracts, Indian contracts, and the heart hospital; that he was damaged in any way. Now, what they've done is attach to the response -- their response, the pieces of the expert reports of Dr. Winslade who is a peer review expert tendered by the plaintiffs and Dr. Riddle who is an economic expert. And those expert reports were served on the parties earlier in the month or earlier in the month of January actually and are attached as evidence of the fact that Dr. Cohlmia suffered money loss because of the actions of both hospitals, if you read those reports. It doesn't break out St. John and Hillcrest and OHI and all of these other people. It just says he should have earned this much and he earned this much, therefore he had a loss of the difference between the two.

Our point and the cases that we've tendered to Your Honor state that those expert reports under Rule 56 are not admissible unless they are sworn to. Rule 56 provides for a wide variety of materials that can be presented to the Court on summary judgment, but it does not include unsworn statements or hearsay. And that's what those expert reports are, they are simply unsworn statements. So we contend that they cannot be used and should not be used by the Court to show any damage occurred. Without those two reports, there is absolutely no

evidence in the case that Dr. Cohlmia ever suffered one dollar of damage as a result of his suspension at St. John.

Finally, I want to cover just briefly the issue of malice. I don't want to make this case about malice because I believe it's about failure to prove the causation of damages. But we do have the Overbeck case which says that you have to prove malice in order to establish a cause of action for intentional or tortious interference with contract. A recent Oklahoma Supreme Court case, Tuffys vs. City of Oklahoma City, which was decided in January of 2009 and has not been formally released for publication, but it gives -- it's a case about intentional inflection in the context of can this action be brought against a municipality. And malice was defined there as "unreasonable and wrongful acts done intentionally without just cause or excuse." I think that's a fairly typical definition.

There's no objective evidence in the record of malice by St. John Medical Center, Dr. Allred, or Dr. Burnett. Plaintiffs have, in their responses to the facts that we listed in our motion for summary judgment, have made a number of contentions that acts taken by people at St. John were done poorly, that there was a perception of rudeness, that they failed to talk to Dr. Cohlmia before they suspended him, that they took 30 days to do the investigation which was a long time, that he should have been suspended in the first place

instead of 30 days later.

There's several claims that they make, but none of these rise to the level of malice. There's nothing in there which indicates that Dr. -- that Dr. Allred or Dr. Burnett were out to get Dr. Cohlmia or did anything unfair or illegal or that they never -- or that they did not essentially follow their medical staff bylaws through the hearing with Judge Brett and the approval of his report by the medical executive committee and the board of directors. If these actions are to be the basis of a finding of malice by this Court, they have to be illegal or wrongful or they have to be intentionally unreasonable. And it's not enough that Dr. Cohlmia believes that they were.

Obviously he thinks he's a great surgeon and he believes that the only reason he would have been removed or suspended would be because somebody was out to get him, but that -- what his subjective view is is beside the point. What Your Honor has to have in order to show malice is evidence that somebody did something that was wrongful, illegal or was grossly or intentionally unreasonable. And there's simply no -- no evidence of that. Malice is really about proof of intent, what was in the minds of the people who investigated these two bad surgeries and the people who took action on it including Judge Brett.

We say that the intent was to protect patients. Dr.

Cohlmia says the intent was to destroy his Heart Hospital idea and to destroy his career. The point here is that there's no evidence offered to the Court here that shows that St. John intended to interfere with either patient contracts or to interfere with insurance contracts. There's no intent shown that they were out to -- that they had something to gain by interfering with insurance contracts, that they had something to gain by interfering with patient contracts. There's simply no basis for a finding of malice and there is no evidence of malice that's been tendered.

There's a couple of documents, one of which is a memo that Dr. Allred says he wrote on June 26th. Understand these surgeries took place on June 6, so this is 20 days downstream from the surgeries taking place. Dr. Allred has been conducting an investigation. He's concerned, he's talked to a number of other physicians. He's talked to the management of the hospital. And he gets a visit from Tony de Leon who's a doctor employed by the hospital, head of the Cardiovascular Institute. Dr. De Leon's deposition was taken, he's retired now. And Dr. de Leon came to him and said Sister Therese is concerned, you've lost control of Dr. Cohlmia. What are you going to do about it? And what that memo says is is that the first thing Dr. Allred said to Dr. de Leon is this is not Sister Therese's business, this is not the business of the hospital management. This is the medical staff's business and

I'll take care of it. That's the first thing that memo says. The second thing it says is he assures Dr. de Leon, who was obviously concerned, and said we're looking at his cases, we're watching the things he's doing. We didn't suspend him, we're watching the cases he's doing.

Now plaintiffs infer an intent there for malice, that they were out to get Dr. Cohlmia because they were looking at his cases and looking at what he was doing. But in fact, an equally logical conclusion from that would be that they are simply trying to protect themselves. They have not suspended this guy who did two bad surgeries and now he's telling Dr. de Leon we're watching him. I've got the QA people looking at his cases and everything is under control. That's basically what my view of that memo is. But there's nothing in that memo that indicates that anybody is out to get Dr. Cohlmia or to do anything other than protect the hospital's patients.

So in summary, I will point the Court to the case of Mac Adjustment cited by both cases. In Mac Adjustment, it says that Mac in that case failed because it could not establish any evidence that the defendant intended to interfere with contracts between plaintiffs and the defendants' member companies. And I would say that this case is just on point. There is no evidence been tendered by the plaintiffs which support their allegations of intentional interference with either the contracts or with prospective business advantage.

Does the Court have any questions?

THE COURT: No further, thank you.

Mr. Barkett.

MR. BARKETT: Yes, Your Honor.

THE COURT: How are you, sir?

MR. BARKETT: First, let me point out that it's interesting that Mr. Lewis seemed to raise all of the issues of fact that exist in this case. I think that everything he said in here just highlights the issues that the jury is here to determine with regard to malice, whether or not loss was suffered in this case, and whether the actions of St. John Medical Center indeed led to the following actions through Hillcrest, SouthCrest, and Saint Francis which ultimately eliminated him entirely from the Tulsa cardiovascular surgical market, relegating him to practice in Tahlequah, losing his entire patient base in Tulsa, losing his entire referral source in Tulsa which is axiomatic in the fact that -- and the federal courts, the supreme courts have all seen that adverse reporting to the National Practitioner Base which is what was the ultimate effect of St. John Medical Center's actions against Dr. Cohlmia, led to his demise. It's a domino effect. When he says that they took -- they didn't take any action against Dr. Cohlmia outside, what they wanted to do, the facts don't -- what we presented as facts do not support what they are saying existed in this case.

When Dr. Cohlmia -- they based their decision to summarily suspend, not restrict, not take him through the process of peer review, but summarily suspend him based on two thoracic lung cancer cases that occurred in one day, on June 6, 2003. There is a memo, as mentioned by Mr. Lewis, that was drafted by Dr. Allred who is the head of St. John medical staff, which talks about, and it's attached in our papers, which talks about how he's been --

THE COURT: Which number?

MR. BARKETT: Gosh, I don't know the exhibit number, Your Honor. I can find that for you. I can show you actually the document if you'd like to -- that's it, yes.

THE COURT: Number two.

MR. BARKETT: Yeah. Which I think is a smoking gun here. By the way, acts of conspiracy are rarely admitted. And we admit that we've not had a person from St. John admit they were out to get Dr. Cohlmia, but certainly the indications from all of the evidence in this case point to that. It talks about how Dr. Cohlmia, as a result, basically what happened was as a result of his being boycotted by the physicians at Hillcrest, had to take more of his patients over to St. John Medical Center. This memorandum talks about how he's gone from two percent to 28 percent of the cases done there which infringes upon the other surgeons' operating room time. Quite significantly he talks about these are primarily the Indian

health type cases that he brings to the hospital. And the inference there is that they are low pay, high risk patients.

He goes on to talk about how difficult it is to remove someone from the staff once they have full privileges, clearly indicating that the intent there is to remove him from the staff. And that he has directed the entire staff at Hillcrest to conduct a hundred percent review of all of his cases. We're not talking about peer review, we're talking about clandestine review of Dr. Cohlmia behind his back in an effort to find something to latch onto. Significantly, this June 26, 2003 memo, like Mr. Lewis said, is a month after the -- approximately 20 days after the two surgeries that they claim warranted summary suspension, not peer review, but summary suspension occurred. There's no mention of those cases in here. In fact, between the time that Dr. Cohlmia performed those surgeries, he was permitted to perform approximately 25 to 30 additional surgeries. One of the physicians involved in the decision to summarily suspend Dr. Cohlmia, Dr. Burnett in fact referred patients to Dr. Cohlmia in that interim period.

So clearly the idea of summary suspension was not on their minds until they saw it as a means to effectuate his ouster which ultimately again led to the domino effect. When he was summarily suspended, they automatically issued a report to the National Practitioner Data Bank. That in turn caused or purportedly caused the actions taken against Dr. Cohlmia by

Hillcrest Medical Center, SouthCrest, and ultimately the writing was on the wall with Saint Francis and he withdrew his application there. Also --

THE COURT: What is there before me in terms of evidence to support your domino effect theory, that losing privileges ipso facto, results in staff losing privileges at other hospitals?

MR. BARKETT: Well, this is one thing. And again, the way these motions are broken down on this schedule, Your Honor, a lot of the evidence that pertains to Hillcrest Medical Center and what their ultimate motion for summary judgment will provide and what we'll respond to, is so intertwined that it's difficult simply to respond because there is such great evidence of collusion here. Not only did the National Practitioner Data Bank report cause -- was the catalyst or the excuse, pretext at least, for Hillcrest who immediately imposed literally impossible restrictions on his practice there, but in fact we believe Dr. Allred and, it's admitted, that someone from St. John Medical Center called up Dr. Landgarten at Hillcrest Medical Center the evening of or the day after Dr. Cohlmia was locked out of St. John Medical Center based on this quote/unquote summary suspension.

It's admitted in the papers that's a breach of confidentiality, that's improper action. Now, Dr. Cohlmia would have an obligation to inform Hillcrest of the action

taken at St. John, but it had barely been 24 hours. Someone from St. John was on the phone to Hillcrest informing them that they have indeed invoked the summary suspension and basically the ball is in their court now. They immediately imposed impossible restrictions on his practice at Hillcrest which made it impossible for him to admit patients --

THE COURT: Where is the evidence of that phone call?

MR. BARKETT: It's in a minute from Hillcrest Medical Center medical executive committee meetings and it's also --

THE COURT: Can you point that -- me to that?

MR. BARKETT: I believe it's in our papers here. I'm not a hundred percent. I can certainly supplement with that evidence. In fact, Dr. Landgarten --

THE COURT: Well, I mean, we're here today for the hearing so I'm going to need to -- if you need to take a few minutes, feel free to do that. But secondarily, with regard you made the statement that there's no reference to the June 6th operations here in this June 26 memo, but, I mean, it's implicit. The subject here of the June 26 memo is operation without consultation and that's the heart, without other consultation. That's the central focus of Judge Brett's findings, right?

MR. BARKETT: Well, I believe that what Judge Brett first of all did not know is that this ongoing investigation was there. And a central theme of their claim, which

incidentally was never found to breach any standard of care, was simply a finding that --

THE COURT: In fact, he says it in his memorandum that it does violate the national standard of care, correct?

MR. BARKETT: My understanding is that the evidence presented at the hearing was that there was not a breach of a standard of care, that it was a judgment decision that they called improper judgment. However, Judge Brett's decision was made without the knowledge that they were actively seeking methods in order to strip his privileges. Furthermore, Judge Brett was not made aware of the fact that the two cases that were actually at issue were not peer reviewed by any thoracic surgeon. Dr. Cohlmia was not involved in any explanation of those surgeries. And when they finally were peer reviewed under the Q and A procedure that St. John had in place approximately a year later, they were not found to be egregious to the level -- egregious by variances to the level of requiring a summary suspension. In fact, one of the surgeries was ranked a three out of five and one was ranked a four out of five. These were not even performed at the time that Judge Brett was hearing that case. We're not faulting Judge Brett in this case. What we're saying is that there was not a fair peer review hearing. The evidence was not presented and Dr. Cohlmia was not given the opportunity to respond according to the rules.

Now, the HCQIA immunity arguments, which we're sort of getting astray to, have been held in abeyance on this --

THE COURT: I don't know that we're really getting into immunity here. Mr. Lewis really focused on proximate causation of damages here, and he did go into malice as a secondary argument. But I think his focus for today's purposes, he sent the message that he's focusing on proximate causation of damages, right?

MR. BARKETT: That's correct. And I was trying to give the Court a little more background, since he said that there was no evidence of any actions, improper actions taken. But the damage to Dr. Cohlmia again is axiomatic. It's a fact question that needs to be decided by the jury. Indeed, Dr. Cohlmia addressed and talked about his loss of income, the fact that he expended his entire savings, all his 401(k) in order to survive during this period of time. It's undisputed, in fact, Mr. Lewis admits that Dr. Cohlmia lost -- he went from the number one provider of cardiovascular surgical services in this market to zero. He was forced to leave. He lost all of the prospective business advantages of those patient -- patient related services. Undisputed that when the domino effect started by St. John through an improper peer review, led to the restrictions at Hillcrest, that he was indeed boycotted. And OHI physicians, cardiology support physicians who's necessary component of the provision of cardiovascular surgical care,

coerced and persuaded patients not to use Dr. Cohlmia. That if they did insist on using Dr. Cohlmia, that they would no longer provide them cardiology services. This is egregious conduct. This is conduct that goes beyond the pale of reasonableness. This is using patients as pawns in this. And it all started with the improper and bad faith peer review process conducted by St. John.

Contrary to what Mr. Lewis has said, Sally Foster, the head of the Cherokee Nation that was deposed in this case and her testimony is of record, talked about the impact on his contract. Although he didn't lose it, he had to go through a peer review process and I believe a legitimate peer review process at the Cherokee Nation based on the actions undertaken by St. John Medical Center and Hillcrest which they found to be no breach, but it certainly impeded his ability to practice during that period of time. Certainly Blue Cross and Blue Shield and other insurance carriers at the time, based on the National Practitioner Data Base that again was illegally processed through an illegal peer review at St. John, caused them to terminate his ability to accept patients under those plans until he went through the appeal process. Dr. Cohlmia has to go through this appeal process now every year based on this National Practitioner Data Base report out there from St. John and ultimately Hillcrest that can never be removed. Hopefully sometime at the conclusion of this case, we can get

an injunction removing that, but right now he's still living with that.

Obviously the development of his Heart Hospital which they want to minimize, but certainly was well on its way to production, architectural plans had been drawn, investors had been acquired including Dr. Cohlmia himself, including investor groups from outside the city, and again, his massive patient base that he had that he no longer has. Those are all issues of damages. Those are all -- show clearly damages and impacted his ability to practice and earn a living. They don't even dispute that it impacted his ability to earn a living. So what we're looking at here is the bad faith intent of the parties involved, but there's a plethora of evidence of loss. And I don't even believe that's disputed. At a minimum, it's a question of fact for the jury to decide.

Your Honor, also if the Court pleases, we would certainly offer -- on the issue of the expert reports, they were attached. We had a brief scheduling order here on these particular motions. The expert reports were attached and incidentally the defendants have requested that the expert depositions and have been provided with one of the -- with dates for the expert depositions and we're in the process of providing them with the dates for another expert which they'd requested, as we have requested theirs and received no dates but... so they will testify to what they've talked about. And

if the Court prefers us to, we certainly can go to these experts and have them swear to the statements that they have made in their expert reports. The facts and the basis and the law supports our claims. And for it to be -- for their motion for summary judgment on this issue to be granted based on that, I think would be unjust. And we're certainly willing to allow them to take the depositions, test the reports, and then the Court can see how that pans out. Or in the alternative, we would simply have them sign affidavits verifying the reports, but the evidence is all there and the law is all there.

THE COURT: Anything else?

MR. BARKETT: That's all.

THE COURT: Mr. Lewis.

MR. LEWIS: Just one or two comments, Your Honor. What comes to mind -- and I appreciate Mr. Barkett's remarks and I think he was accurate on some of the items in the record, many of the items. Comes to mind is the old commercial that Wendy's used to run with the little old lady that said where's the beef. It's not enough under Rule 56 to come into this courtroom and before this Court in a matter that if it's decided in favor of St. John, will be packaged and ready for appeal when the case is over and have to be looked at by judges up above. It's not enough to come in here and say, well, we can get this evidence, we know where it is, we can get it. Why didn't they get it? There is no evidence there. Where's the

beef?

This business about the National Practitioner Data Bank, the impact it might have had on other hospitals, where is that in the record. Where is the information or deposition or an affidavit from somebody that said we saw that National Practitioner Data Bank result and, by golly, we immediately pulled his privileges. There's nothing there. Where's the beef? He talks about the fact that this memo of Dr. Allred's is a smoking gun. My understanding of the law is this. Malice has to be proven. And in this case on summary judgment, we do have some things that we've had to establish by the record and we've tried to establish those things. But the law says that they have to establish the things on which they have the burden of proof. And what they have the burden of proof is to show the Court that this document that they call the smoking gun is, in fact, a document that demonstrates malice on the part of St. John and an intent to interfere with Dr. Cohlmia's legitimate contracts with other parties. It doesn't say that. You might read it that way, you can pull words out, but the law says that if a document can be read equally to prove something or to disprove it, then it doesn't prove it.

I agree that damages are a question of fact for the jury. What the jury decides is the amount of damages. The Court decides whether or not there's causation for damages. The Court decides whether or not there's any damage at all.

And if the Court so decides, then the jury goes back in the jury room and decides how much they are. So the fact that damage is a fact question for the jury is not an answer. I don't know anything about this Cherokee peer review process. There's nothing I've seen come out in the depositions about Dr. Cohlmia having to go through peer review with the Cherokees and certainly where's the beef, there's no evidence in the record. We ask that you sustain our motion for summary judgement. Thank you.

MR. BREWSTER: Your Honor, briefly can I comment on two things?

THE COURT: All right. Well, he gets the last word. Go ahead.

MR. BREWSTER: Right, just briefly, Your Honor. As I understand the main issue for Mr. Lewis' proximate causation and the issue he has a problem, I guess, with is the termination of privileges or the suspension of privileges proximately causing damage to a physician. And Mr. Barkett used the term, this axiomatic. Well, there is circumstantial evidence and inferences can be drawn from evidence. And with regard to a motion for summary judgment, the Court can certainly consider that circumstantial evidence and those inferences.

And I was trying to think of an analogy that would be so clear to the Court. It would be like if we had a case

involving, and a little farfetched from this analogy, but the conclusion I think holds true, where you had a competitor, a retail competitor just getting a bulldozer and dozing down the other competitor's store. And then the argument would be, did this really impact, for summary judgment purposes, his ability to conduct business with those customers. And Mr. Lewis would say, well, they don't have any customers that said they were going to come that day and nobody is really complaining and that that person who had a store bulldozed down had another store in another part of town and, therefore, those customers can come over there and there was no interference with the relations with those customers. Well, that would be -- that would just be foolish. And similarly situated here is they take this doctor and wipe out his ability to practice medicine and --

THE COURT: It doesn't really. It begs the question -- this is an interesting question because if the Court adopts your approach, and I understand, it's an interesting argument here, then the termination of privileges at one hospital under your domino theory would always support, for purposes for summary judgment, proximate causation allowing you to go to the jury, at least on that third prong, always.

MR. BREWSTER: That's correct. And the reason it would -- I mean, there could be other issues that might be summaried out, but if it was in bad faith, if it was

anticompetitive, if it met --

THE COURT: Yeah, but I'm just focussing on the third prong.

MR. BREWSTER: On the damages. And the answer would be yes, absolutely. And I think of the Tarabishi case that was handed down by the Tenth Circuit. I tried that case, a nine week trial in front of Judge Cook. And very similarly, once you take action against a physician's privileges for the purposes of that anticompetitive reason and not for good cause and not for the reasons that peer review committees should act, you are --

THE COURT: Was tortious interference a cause of action in that case?

MR. BREWSTER: I'm sorry?

THE COURT: Was tortious interference a cause of action in that case?

MR. BREWSTER: That case was tried twice. The first trial was on the tort claims. It was tried by Senator Stipe as Dr. Tarabishi's lawyer. The antitrust claims were tried in the second trial and I tried that one. So the tort claims were tried in front of a jury and they were allowed to go to the jury on those claims and they returned a defense verdict in the first trial and that may well happen here. But it is fair -- for these physicians and these lawyers for these physicians to say that wouldn't have a completely devastating effect on a

practitioner to be summarily suspended. And the timing is critical, too. I mean, they're claiming about two events that occurred in June and they summarily suspend him more than a month later and in the interim we have this memo.

THE COURT: Well, but he asked for the quick hearing, right?

MR. BREWSTER: No, the summary suspension was given a month later. In other words, he's practicing medicine --

THE COURT: Oh, right, the request for the hearing occurred after the summary suspension?

MR. BREWSTER: Yes.

THE COURT: Yes, that's right.

MR. BREWSTER: He's practicing medicine --

THE COURT: That's what triggered the Brett review.

MR. BREWSTER: The very doctor that delivers the summary suspension more than a month after the event of these two cases is referring during the interim before they deliver the summary suspension. That is just incredible. If they would verily believed that this man needs to be summarily suspended after these two deaths -- or one death, I'm sorry, then they would have suspended him that day, next day, maybe a week, but a month later.

THE COURT: Well, but these are fact intensive.

MR. BREWSTER: Right, correct.

THE COURT: I mean, as you know, you've got to review

the facts.

MR. BREWSTER: That's correct.

THE COURT: I mean, what sense would it have made to summarily suspend the next day? There's no way that one can gather the necessary facts to make that determination in a day or two days, correct?

MR. BREWSTER: No, no, that's not correct. Summary suspension is based upon a preliminary understanding of a very bad event that might pose danger to patients coming in. Summary suspension is a very extraordinary action and it's done without a hearing and it's done to preserve the status, like an ex parte order under exigent circumstances. This was done five weeks later and frankly I've never seen that happen. Maybe they can have other examples they can provide to the jury as showing this is reasonable. Five weeks after this gentleman dies they do a summary suspension. During that five week period, they could have peer reviewed that case and made a decision that wasn't summary in nature.

THE COURT: Well, now he died after the second surgery, correct? He didn't die on June 6th, he died after the second surgery.

MR. BARKETT: One patient died after the second surgery but that occurred, I believe, four days later.

THE COURT: Okay. There was only four days after June 6th?

MR. BARKETT: About four to six days. The other patient didn't die.

THE COURT: I understand that. I understand.

MR. BREWSTER: But it's still more than a month or nearly a month later that they deliver this letter of summary suspension without any review of the case, without any conference with Dr. Cohlmia during those four or five weeks. It just smacks clearly of a way to take him out now. And it's like the ex parte order from the Court, I mean, it gives a tremendous advantage to the people prosecuting him if they have him out of the -- escorted him out of the hospital and that's what happened. That goes to the bad faith nature of their conduct, but they knew exactly what was going to happen to a physician that would get a National Data Bank report of a summary suspension. That's a death blow.

THE COURT: I mean, essentially you are arguing, as to the third prong, that damages are presumed whenever there is a loss of privileges.

MR. BREWSTER: Absolutely. And the expert will testify to that. And they won't be able to present a doctor from their own ranks that will say anything differently than that. They all know that. And medical malpractice defense cases, the plaintiff, one of the things greatly negotiated around is what's going to be the impact on this doctor of that National Data Bank report of a settlement, for example, or a

verdict? I mean, that is a critical pivot point. And to have a summary suspension, in other words, doctors saying you need to leave now, you can't see anyone else, it is an imminent immediate danger to patients going forward right now, and have that delivered to the National Data Bank, it would be a death blow.

THE COURT: Does the National Data Bank distinguish between a summary suspension and a suspension after more review?

MR. BREWSTER: Your Honor, as an officer of the Court, I can't say certainly, but I believe yes, and I believe the experts will testify to that. A summary suspension is a very grave report. Now, I'd have to confirm that there is that distinction, but I believe the answer is yes. Thank you.

THE COURT: Mr. Lewis.

MR. LEWIS: To speak specifically to that, the National Data Bank was set up so that any adverse action with regard to privileges, even if they had come in and said okay, we're not going to let you do thoracic surgery here anymore but you can do all the cardiovascular surgery you want. I mean, that's one of the outcomes that they are going to argue should have happened. That has to be reported to the Data Bank, anything that's adverse action as to privileges is reported to the Data Bank.

You know, this is really a Monday morning quarterback

thing. After a lot of years in the practice of law I see it a lot. But let's just look at this reasonably and I think this has a lot to do with their argument. If they had suspended Dr. Cohlmia on the day of those two surgeries, then Clark Brewster would be in here today arguing they had no investigation, how could they do this, this man had practiced for 20 years at this hospital and they suspend him without even an investigation, that's terrible, it's malicious. So you're damned if you do, you're damned if you don't.

The same thing is true with regard to the issues on whether or not he was reviewed by his fellow surgeons, his fellow thoracic surgeons. You know, look at the position St. John's is in. If they come in immediately after these surgeries and bring in his competitors and say look at what he did here, then Clark Brewster would be here today saying those guys wanted to get him out of there because he was competing with them and he was stealing their patients from them and that's the reason they brought them in. So what St. John did is they just isolated those guys. They hired experts. They hired surgeons from out of town, out of state to come in and look at the cases and testify before Judge Brett. So you know, again damned if you do, damned if you don't. If they had done it the other way, Clark Brewster would be in here arguing that Dr. Blankenship and Dr. Fore and those guys were just out to get Dr. Cohlmia and that St. John allowed them to do it.

So what I want to get back to is the lack of evidence under Rule 56, that's what really the key is here. And the Data Bank thing is not a part of the evidence.

THE COURT: Right. Now, essentially -- and Mr. Brewster admits that with regard to your focus on the third prong, that damages should be presumed under Rule 56 by this Court whenever there is a suspension of privileges. Your reply.

MR. LEWIS: I can't agree with that. I don't know any law that says that they be presumed. The law says that on summary judgment, the party that has the burden of proof has the duty to come forward with the evidence. So to the extent that St. John, Dr. Allred, Dr. Burnett have the burden of proof to establish to Your Honor that this cause of action doesn't exist, we had a duty to do that and we've done it. To the extent that there are points or portions of the proof that have to be made by the plaintiffs in this case, they can't rely on their pleadings. The law says that. They can't rely on speculation. They can't rely on hearsay. They have to come in here with evidence that is under oath or that is established or agreed to by the parties that establishes that there was damage and they haven't done that. It is not presumed. There is no law that I know, no case I know of that say that damages are presumed when one party acts that causes some kind of detriment to another party.

Somebody could take an act against me, could punch me in the nose -- and John and I were talking about this yesterday. If he punched me in the nose and I was out for two weeks from the office, it doesn't necessarily mean that I've been damaged in my contracts. My nose hurts a lot. My feelings may hurt a lot and I may be angry at John, but it doesn't mean that I haven't been able to perform my contracts or that my contracts have been interfered with. That's what we're here talking about today. We'll be talking about this other in June and I'm ready for that.

THE COURT: Anything else?

MR. LEWIS: That's all, Your Honor.

THE COURT: Based on the briefs, the arguments of counsel here, and the evidentiary materials submitted to the Court, the Court would first note that there has been no Rule 56(f) affidavit filed by the plaintiffs to indicate that they cannot present facts essential to justify its opposition. So with due respect, the oral request of Mr. Barkett essentially to supplement here will be respectfully declined given that Rule 56(f) has not been followed here.

As to the motion, I believe Mr. Lewis is correct, the focus here in the motion is damage proximately sustained as a result of the interference. I don't believe there is -- and I think this is at the heart of the argument today. I do not see case law for the proposition that damages should be

automatically presumed by the Court based upon a suspension of privileges. Because of the absence of proof of damages here, the motion with respect to Counts Roman V and Roman VII set forth in the motion for summary judgment of St. John Medical Center, Howard W. Allred, M.D., and William C. Burnett, M.D., Docket Number 279 is granted. Let's take a short recess and we'll be back on the other motion.

(Recess.)

THE COURT: For the record, the Court would correct one statement that it made. Insofar as the claims for tortious interference with contract and prospective business advantage were both incorporated in Count Roman V. Count Roman VII was the Section 1981 claim as to which a stipulation of dismissal has been filed. So the Court misspoke with regard to granting summary judgment as to both Counts V and VII. To be accurate, the Court simply granted summary judgment on Count V. The motion for summary judgment is moot in light of the stipulation of dismissal with regard to Count VII. All right.

MR. BREWSTER: One inquiry, Your Honor, if I may?

THE COURT: Yes, sir.

MR. BREWSTER: If I'm right, Count V also included garden variety defamation.

THE COURT: I think that is as to the next motion for summary judgment.

MR. BREWSTER: Did it not also include defamation on

St. John as well?

THE COURT: Not as to St. John.

MR. LEWIS: There are no defamation claims against St. John.

THE COURT: All right. Let's address docket number 290, the motion for summary judgment Count V and VI of defendants Oklahoma Heart Institute, Inc., Oklahoma Heart, Inc., and Wayne N. Leimbach, Jr., M.D. Mr. Carwile.

MR. CARWILE: Thank you, Your Honor. I think for purposes of trying to move along and integrate what I expect to hear as evidence of tortious interference, some of which piggybacks on the defamation claim, with the Court's permission I'll start first with the defamation claim. And of course, this amended petition docket 90 contains a myriad of allegations of defamation by either employees unknown or known, or named employees of OHI. And, therefore, the discovery undertaken was to depose or attempt to find the evidence of any kind of actual defamation. I think analytically for purposes of summary judgment, of course, we want to address, was there defamatory statement standing alone? Is there evidence of it? Is there evidence from which the finder of fact could find publication or otherwise stated as a matter of law, are there circumstances where under the facts there is no publication? And number three, are there undisputed facts which lead to the conclusion that as to some statements they're privileged as a

matter of law?

Now with respect to the count for defamation, we did have as one grounds an immunity claim under HCQIA which has been put in abeyance. We agreed with counsel for the plaintiffs that although we briefed it, that was before the Court made its rulings on the extended discovery on some of the peer review stuff. So they didn't respond to it and we don't advance that argument here today. Of course, there's two other axioms about defamation. One is the statement has to be made within a year of filing the amended petition -- or the original petition. And two, there are minimum levels, but they are not de minimis as to what a plaintiff must establish to establish a claim for defamation. There has to be some level of particularity as we set out in the cases. You know, who was the speaker? What, near as one can recall, did the speaker say? To whom did the speaker say it? And unless they can, they, the plaintiffs, can come up with admissible evidence to support a claim for a particular statement, then that particular statement must fall. It can't survive summary judgment.

And of course, when faced with the kinds of allegations we are at OHI and with Dr. Leimbach, in the amended petition it's not our burden to prove that no defamation occurred. It's our burden to show enough evidence that there's none in the record that we can find. And it's on the plaintiff

to show a defamatory statement. And I would agree that we need to show uncontested facts, facts not in dispute, that would establish no publication or privilege. So with that in mind, let's focus on what came back in the response to the motion for summary judgment.

THE COURT: Before you do that, I had looked at it from the perspective of -- and I'll give plaintiffs a preview of the way I had conceptually approached this. I'm interested in hearing from the plaintiffs to delineate any statements that are either not time-barred, because Judge Payne decided that statute of limitations bars any statements made prior to July 7th, 2004; statements that are not hearsay referencing your level of particularity; and three, what statements are not subject to intracorporate immunity. So a lot of this motion with regard to defamation will be addressed in your reply to the response.

MR. CARWILE: I agree, Your Honor. Let's, though, talk about what could be in the record that would clearly be a defamatory statement. What evidence could be proffered in the plaintiffs' response that would defeat this motion as to a single statement? An admissible statement in admissible form that somebody who heard it, that is heard one of my clients or its employees make a defamatory statement. One. One affidavit by one patient who was told something derogatory about the doctor, Dr. Cohlmia. Dr. Cohlmia testifying that it was made

to his face in the presence of somebody else, where anybody could hear it. A writing, we don't have any evidence of that. Or a statement that clearly would not be hearsay. And the truth is when you read the response, there's not a single piece of admissible evidence on a single statement that would meet that criteria. There is one statement by Dr. Adams that Dr. Cohlmia said to him -- I mean, that Dr. Leimbach said to him, Dr. Cohlmia is litigious. Not published to anybody else, said to Dr. Adams. Our position is that as a matter of law, that's opinion. Not published to third parties, not published with any intent, no damage.

Now, what does Dr. Cohlmia say in page after page after page of his deposition when he's questioned? That either a patient who he can't remember told him, a patient who maybe he can remember quoted and relayed to him the hearsay statement of an unidentified OHI physician, or a patient who he thinks he can remember, but can't tell when and where told him what an OHI physician said. All of that is hearsay or fails to establish the elements of a defamatory statement. We're really down to, in this case, because there's -- as I said, you would think that if there's a patient out there who heard something of a defamatory nature, that affidavit, under the Rule 56 requirements, would be appended to that response. There's not a single one and there's not a single patient whose deposition was taken who said that. And there's not a single third party,

none of these healthcare providers, none of the people at the Indian Health Services. We put it in our brief but there isn't a single statement that they testified to made by an OHI employee or physician of a defamatory or disparaging nature. It's not in the record.

We have two pieces of testimony, two doctors, Dr. Decker and Dr. Giddens. They say they heard -- one says he heard Dr. Lynch of OHI make derogatory comments about Dr. Cohlmia. And the other says he doesn't remember who the speakers were, but he remembered OHI doctors doing that. But both of them admit, plaintiffs don't dispute, and it's beyond dispute in this case that the only time those statements were made to which were testified, they were made in Hillcrest medical committee or peer review meetings. There is no evidence in the record of a statement that a firsthand listener has attested to that's in this response by the plaintiffs of a statement, a derogatory statement outside of a peer review or a medical committee meeting. That's undisputed.

So if you presume just for purposes of argument that Dr. Giddens and Dr. Decker's testimony established some disparaging statement, the question is are my clients entitled to summary judgment? First, on the grounds of intracorporate immunity, that is there is no publication as a matter of law. It's undisputed that at all times Dr. Leimbach -- in fact, it's number four of our facts to which they don't dispute, that at

all relevant times, he's sitting on one or more of these committees. That the evidence in the case is that he would be on the peer review committee for a while and then go off and another OHI doctor would go on peer review and he would go off -- he being Dr. Leimbach, would go off to the medical executive committee meeting and they would do that. And the question is, does that as an undisputed fact that these doctors were sitting on these peer review committees, establish the necessary basis to find that there's no publication?

Now, there's a second argument which is that it's a privileged communication, but you don't have to get there if you find that there's no doubt that this is an intracorporate communication. And the law is clearly that a doctor sitting on a Hillcrest peer review committee, making statements in that committee meeting to other peer review committee members, that is an agent of Hillcrest in doing so, that is not a publication.

We have established that the agency relationship exists. Now, the Thornton case talks about there's a conditional privilege beyond that where one's good faith, intent, those kinds of things matter.

THE COURT: I don't think it's appropriate to get there.

MR. CARWILE: Don't need to do that for purposes of today's motion. We just have to find do we have admissible

evidence of a disparaging statement, a defamatory statement and is, as a matter of law, is the no publication which we urge for the limited number of statements, does it apply?

There is one final allegation by the plaintiffs and that is in the fair hearing proceedings that occurred I believe in 2006, the claim is that Dr. Leimbach came to those proceedings and lied. Lied in those proceedings. And that, at least on the record, clearly would be within the year before the filing, although I think it may -- I don't know if this was already on file before that happened or not, but it doesn't really matter because as we set out in our -- I believe in our response -- our reply brief, as a matter of law under the Kirschstein case, the Oklahoma Supreme Court 1990 case, that is a administrative or quasi judicial proceeding for which there's absolute immunity, not related to HCQIA, but related to Oklahoma law. In that case, the Supreme Court specifically noted that that absolute privilege had been deemed to apply in such things as hearings on a physician's staff privileges before the board of directors of a hospital district.

So the Oklahoma Supreme Court doesn't confine that privilege defense solely to judicial proceedings under a state court proceeding or a state administrative proceedings. Clearly the Kirschstein v. Haynes case insulates Dr. Leimbach's statements made at the fair hearing itself, without conceding at all that they are defamatory. If you take for purposes of

argument that they are false, they are absolutely privileged. I believe I'm correct in saying, Your Honor, that the only statement in the record that anybody, any witness made, or anything that the plaintiffs point out as allegedly defamatory that has any temporal certainty to it is that allegation that Dr. Leimbach lied in the fair hearing proceeding. Other than that, there's not a date of when anything -- any evidence that any of the statements that are complained about occurred -- admissible evidence, that any of those occurred within a year of the filing of the lawsuit in this case.

THE COURT: When was that alleged statement made by Leimbach?

MR. CARWILE: In the fair hearing, hearing at Hillcrest. And I want to say that occurred, Your Honor -- it had to occur in 2006, I believe. I could be corrected. I would say that's probably within a year, I know it's within a year. It didn't occur, I don't believe, in 2003 or 2004.

THE COURT: So in your arguments, you do get to privilege and immunity with respect to the alleged Leimbach statement?

MR. CARWILE: Yes, Your Honor, but not based on HCQIA. Based on the absolute privilege afforded under the Kirschstein case. Kirschstein is a matter of Oklahoma law, Kirschstein v. Haynes, 788 P.2d 941 case. It doesn't, that's not a -- that is essentially an interpretation of Oklahoma law and the

restatement on the immunity afforded starting with lawyers down to witnesses and others, immunity from defamatory -- defamation or libel liability for testifying in the kinds of proceedings contemplated. Kirschstein expressly recognizes the kinds of board meetings, the kind of procedures here, physician staff privileges proceedings within a hospital. So that then we do set that out in our -- I believe it's in our reply brief.

But that aside, you can wade through all the deposition transcripts we appended to the motion. And the purpose was to show and to flesh out, to attempt to have the plaintiffs come back and say no, here are 1, 2, 6, 8, 12 statements that meet the criteria of actionable defamation that are in admissible form, but there's not a single one. Even Dr. Cohlmia's statement, I think he testified in his deposition that he was present when a Dr. Des Prez, Dr. Des Prez of OHI made a statement he couldn't identify when it was. And clearly this is exactly the kind of framework that Rule 56 contemplates a party seeking relief for defamation must be able to satisfy. It will not do to say I had a lot of patients and I've got a lot of people that when I find them and come in, the jury will hear about all these bad statements. The time to do it is now. And I was frankly quite startled that there wasn't a single piece of admissible evidence on an actionable defamation that wasn't, as a matter of law, intracorporate or privileged. And I think I say that again in the reply brief. And I would -- I

will be listening to hear whether there is any such statement. I don't believe there is here. I've looked at the responding papers a number of times. There's not a single statement that's in admissible form. And the reason I say that is because I anticipate that unlike -- and really that's all I've got to say about the defamation, depend upon what will happen on the reply, Your Honor, with all due respect.

But what I anticipate is because our case -- our motion for summary judgment on tortious interference is different from St. John's in the singular feature that, you know, as you heard St. John's counsel say, they have one act, you know, one suspension proceeding from which, you know, they were defending any resulting liability for tortious interference. And clearly my clients don't have that. In other words, the allegations against them are that here was the Oklahoma Heart Institute whose doctors throughout 2002, '3, '4, '5, '6, sat on all these committees, whose doctors practiced in that hospital, whose doctors would treat or not treat patients of Dr. Cohlmia's, whose doctors sat on the medical credentialing committee, whose doctors had conversations with people who were involved in the Elkins report.

So clearly you can't -- I can't cast my argument as driven from a single event. But the thrust of my argument is not much different from Mr. Lewis'. But I anticipate that what I'm going to hear is there's such evidence of malice here

because we've got all these statements, all these threats, all these coercions, all these intimidations that, boy, there's so much here, there's so much smoke there really has to be some causation fire. But when you boil it down, as we say in the summary judgment brief, they don't dispute this. There's no evidence of any patient being threatened, intimidated, coerced, frightened. No evidence of anybody being abandoned, despite the fact that Dr. Cohlmia felt that. Again, you've got to go say where -- who testified to that happening? And the reason I think as you could tell from the prior argument, I'm not going to make a malice argument at this point. I'm going to make an argument that there's no causation, but it's not that different from what you just heard.

But let's talk about this whole argument of tortious interference. The thing that I can't agree with is that there's any theory of domino effect on tortious interference because all intentional --

THE COURT: It's an interesting argument.

MR. CARWILE: Yes, Your Honor, but I don't think it works and here is why. One can commit a lot of torts and those can have economic ramifications that may even go beyond what you might expect or think of when a tort occurs. But the tort of tortious interference has an element to it that doesn't just mean that anytime you commit a tort, you interfere with somebody's livelihood or their economic well-being. And since

we all hope to have some prospective economic well-being, any tort that injures that is tortious interference. The case law is clear that the tort of tortious interference contemplates some intentional interference with.

Your Honor, there is an intent to interfere with a relationship that's a necessary element to a tortious interference claim and that's why the domino theory doesn't work. It's not the fact that there might not be some consequential damages flowing from a tort, take assault, take negligence, take all of those things, take unintentional injury to somebody's physical person. Clearly you might have consequential damages for that, are they reasonably foreseeable, that sort of thing. But if somebody gets disabled by an assault and they lose their job and can't pay their medical bills and their doctor sues them, who used to be their good doctor, that in and of itself doesn't establish an intentional interference, that I, the person who threw the punch have -- I'm intending to interfere with the relationship between my victim and his doctor. I have to have some wrongful act by which I intend to interfere with that relationship.

And under Oklahoma case law, that has to be my primary intent, because there's all kinds of things I can do intentionally that will interfere with somebody's economic well-being. I can compete with them. Those are intentional acts. It's got to be wrongful and I have to intend to

interfere with the relationship.

THE COURT: But there you are focused on intent and, of course, the response that Mr. Brewster would make is that -- and he is experienced in these matters and he has made that argument, this particular argument on the record here today. That in terms of settling these medical malpractice cases, a central concern is not showing up on this national database. So it seems to me that you have moved over from proximate causation of damages to intent. And although you wanted to avoid malice, and you will notice that I didn't touch malice in terms of ruling on the previous motion, haven't you segued over to another element here as opposed to proximate causation of damages?

MR. CARWILE: No, Your Honor, because I'm not going to tell you that we're going to say that today as a matter of law you will find no evidence of intent. But the reason intent matters, the reason you have to look at tortious interference that way is because you have to look at the acts complained of to see if those acts are the proximate cause of an injury to a relationship or prospective economic advantage. It won't do to say they did a bunch of acts and overall globally I was injured and therefore whatever they did in this amalgamation of things that they did in working at Hillcrest injured me economically and that's tortious interference with a particular contract or relationship.

I'll give you an example. We know that they say in this case similar claims to what they said against St. John and that is all of our acts, sitting on the peer review committees, working at Hillcrest, deciding that we would no longer treat patients who Dr. Cohlmia would treat while they were in the hospital, that those interfered with the doctor's contract with PLICO. That's what they say. But when asked what evidence do you have that OHI did anything to interfere with your contract with PLICO, paragraphs 19 and 20 of our response, there is none. When asked what evidence do you have that OHI took any action to interfere with your contracts with native American tribal authorities, paragraphs 28 to 32, well, they otherwise interfered, but we don't have any evidence of it. The depositions of the people at those authorities were consistently undisputed. No, it wasn't interfered with, it wasn't canceled, it wasn't terminated, and OHI didn't do anything that caused any of that.

The insurance companies, the three insurance companies we're accused of interfering with, are Community Care, Aetna, Blue Cross Blue Shield. The undisputed facts in paragraphs 22 through 27 are that there's no evidence that OHI caused or interfered with those contracts. They don't even have the argument here that OHI suspended Dr. Cohlmia because it didn't. The OHI physicians may have participated as members of peer review committees and may have testified at the hearing, but

where is the evidence that any primary motivation of OHI or any causal effect of what OHI did was to interfere with any one of those three contracts? There is none. And it won't work to say oh, it would have to, it would just have to, Judge, we know, we're on a medical professional lot, it would have to interfere. No, there would need to be some admissible evidence from Dr. Cohlmia or one of those health care insurance companies saying because of these actions -- which if there's a fact that OHI somehow partially, jointly, or individually responsible for it. We, the insurance companies, or some other party could testify, took some adverse action that impaired Dr. Cohlmia's economic relationship with those insurance companies. There's no evidence like that in this record. None.

We're then down to Hillcrest Medical Center. Okay. We interfered with Dr. Cohlmia's relationship with Hillcrest Medical Center. Well, as a matter of law if we're sitting on the peer review committees, if we're sitting on the medical credentialing committees, we can't interfere with the contracts between Hillcrest and Dr. Cohlmia because in those instances, we're acting as the agents of Hillcrest. You can't interfere with that on contract.

So we're really down to two things, the Heart Hospital and the patients. That's what is left. We have more allegations against us than St. John does. The Heart Hospital.

Where is the evidence that anything OHI did interfered with Dr. Cohlmia's ability to establish a heart hospital? The evidence is the OHI physicians were not interested in joining a heart hospital. Dr. Leimbach testified they weren't interested in joining anybody's heart hospital. They'd heard about it for so long they were tired of it. So what evidence do they have supposedly that OHI is in this, is it a conspiracy, is OHI doing something itself to interfere? Here's the evidence. And this deals with those several memos that are appended to their response which we have pointed out to the Court. One -- two were written, I believe -- one was written by the person, Mr. Ronning that was supposedly helping Dr. Cohlmia do it for awhile until they had a falling out, an internet article I believe that he wrote. And then one of his former partners, I think it's Ruffino who got into a tiff with Ronning.

The problem with those three exhibits is twofold. Number one, they are not admissible. None of those people were deposed. They are not submitted by affidavit. They are just stuck in the record, here's a memo, clearly hearsay. Not really even totally identified or authenticated by the author. Not in admissible form, just put in the record. And read this and you can see lots of problems with the Heart Hospital. Well, even assuming that they are admissible, read them. They do not say anything about OHI intentionally interfering with the Heart Hospital. They don't say anything about OHI having

designs or plans to interfere with the Heart Hospital. There is the selected testimony in the response brief that they tried to slip by that said, well, Dr. Leimbach told Mr. Dobbs once that he was -- that it would be the end of the heart practice or it was really a real problem for Hillcrest if Cohlmia formed that Heart Hospital.

The problem is when you read Dobbs' testimony, as we pointed out in the reply brief. They were asking Dobbs a question from another deposition. He said as to Leimbach, Leimbach never said that to me. Leimbach never said anything. Where is the causational evidence that what OHI did in anything caused Dr. Cohlmia not to be able to pursue or realize a heart hospital? What you're going to hear in response I bet is, oh, these guys were saying so many bad things, threatening so many people, creating so much trouble that it couldn't help but defeat this doctor's dream of a heart hospital which is why I tried to start on these statements and this evidence that's not in admissible form. But I challenge the plaintiffs to point out one piece of admissible evidence that OHI took a wrongful act with the purpose or primary purpose or that, in fact, caused this heart hospital not to succeed. There isn't any.

So what we're really down to is the patients. And the thrust of their case with the patients is that OHI -- well, first they start we threatened to coerce, but the truth is in the papers there is no evidence of threats or coercion in any

admissible form. What they are really down to is the 2003 decision by OHI which admitted that they would not, because of reasons they dispute -- they say it's because we had anticompetitive reasons. We say it's because Cohlmia didn't want to do business with us anymore. We decided, OHI decided they would no longer stay on the cases of patients, nonemergent patients while they were in the hospital if Dr. Cohlmia treated them. Okay. So the argument of the plaintiffs is, well, there you go, you've just interfered with the relationships with the plaintiffs because how could it not interfere? That's basically their argument. You would have to interfere if you were treating the patient and then you didn't.

But here is what the evidence is. Dr. Cohlmia admitted this and Dr. Adams admitted this, the only two people that had any evidence of any problem it caused, that there wasn't a single patient who didn't receive cardiology care as a result of that decision. It's set out in our briefs in paragraphs 12 and 16 as to Dr. Cohlmia and Dr. Adams. They've admitted, in fact, Dr. Cohlmia said he was able to take care of every single patient. So the causation argument is how did OHI's decision, which was a lawful decision, they're not required under law or any kind of a contract to treat any patient if they choose not to outside of emergent and this was nonemergent. They're not required to. Dr. Cohlmia admitted that in our moving papers. We have his testimony. He admitted

the same thing. He wasn't required to refer to OHI and they're not required to refer to him. They don't have contracts so to speak, but clearly there -- I would, for purposes of this argument, there's an expectancy.

But let's talk about a patient who is in the hospital who OHI says we will no longer work side-by-side with Dr. Cohlmia. We'll sign off and you'll get another cardiologist. That's not actionable. Where's the injury? Where's the causational injury? Is there any evidence in this record from a patient from Dr. Cohlmia or anybody else that what happened was the patient said, well, if that's the case, Dr. Cohlmia, I don't want to use you. You're not going to get the revenue from my surgery, that that decision, if you want to assume that it's wrongful, that that decision caused an injury to Dr. Cohlmia. There's not a single patient for whom that argument is made by name or otherwise. There's -- there's no argument that he suffered a loss caused by that decision.

And now, did OHI constitute the large majority of the cardiologists at Hillcrest at the time? Yes. Is it undisputed there were other cardiologists available who weren't OHI? Yes. Is there any evidence they couldn't be used? No. Is there any evidence they weren't used? No. Is there any evidence that Dr. Cohlmia or his practice suffered a scintilla of a loss? There's an argument made in unspecified cases claimed by Dr. Cohlmia, well, there were some delays sometimes, I had some

delay. Did it injure a patient? No evidence of that. Did it injure you, Dr. Cohlmia? No evidence of that. Did that delay cause you some attendant economic harm? No evidence of that. Okay. And the undisputed evidence is that when those patients would leave the hospital, they could and often did go back and use the OHI cardiologists. So I am talking about causation, I'm talking about it, but you have to look at each particular relationship, each prospective advantage and say what act did the doctors at OHI take improperly that interfered with that, caused a loss, caused a greater burden, caused an economic difference?

Now, the one case relied upon by the plaintiffs to say, well, you don't have to have a loss of the contract or the relationship, for purposes of this argument I would say that's true. But it's like saying you don't have to have a loss of the car completely in a wreck, you have to have an injury. You have to have some kind of damage. What damages did Dr. Cohlmia suffer because of the actions of OHI with respect to their decision not to sign on cases with him?

Now, I suppose one of the arguments is, well, you know, they participated in this peer review process and went to this hearing and Hillcrest suspended his privileges ultimately. So as a matter of law, an argument which I know the Court has rejected, there's a loss automatically when privileges are suspended. But I would challenge the plaintiffs to come up

with a single instance of causational -- of evidence of causation of loss, not what, oh, everybody knows it's axiomatic. If it's axiomatic, it ought to be pretty easy to get an affidavit from someone as to the axiom which is lacking here. The affidavit of -- I mean, the report of the expert has the same deficiency that's already been addressed, but again in that report by a Dr. Winslade, unverified, unsupported. You know, there's a whole litany of what went wrong supposedly, but it's not in verifiable or affidavit form and he's not even a prescient witness as to it.

But you know, I think that the effort in the brief to call things undisputed, when you look at their response to our motion for summary judgment, they keep saying disputed, disputed, disputed, see paragraphs six to ten, see paragraphs six to ten. What specific act by whom that interfered with what relationship? And I don't think it will work for purposes of the allegations made here to say, well, there's so many that they had to interfere with something because, I mean, he's a doctor. And when you do these kinds of things, you've got to interfere with something as a matter of law. Well, now is the time to come in with evidence in the form of admissible evidence to resist. And although it's continuous supposedly and, you know, more ongoing over a period of years, this same analysis, this same framework that St. John used I think is applicable here.

THE COURT: Does Oklahoma's new business rule, you contend, play a role in the damages issue here?

MR. CARWILE: I'm not sure I understand that question, Your Honor.

THE COURT: Well, in terms of whether or not one can claim damages for businesses that don't have a track record of earning.

MR. CARWILE: Well, there's a loss/profit speculation standard for businesses that don't reach beyond a certain level of, you know, initial startup and that sort of thing. We haven't made that argument in our brief.

THE COURT: All right. What about as to defamation? Is the fair hearing proceeding subject to the intracorporate immunity doctrine?

MR. CARWILE: I don't know, I want to say yes, of course, but I'm trying to think of a case that would say that, Judge. I will say this and this is important. Under Magnolia which is the main intracorporate immunity case and as reflected in the later case of the Seal vs. Pearle Vision, I think is the one, there's a statement by the court in there that when you're talking about intracorporate immunity, intent and motivation don't matter and I'm specifically talking about the language in the --

THE COURT: I tracked that.

MR. CARWILE: Okay. So is a fair hearing proceeding a

proceeding in which only -- I don't know the answer because you have people that are in that proceeding who aren't all necessarily officers, agents, and employees of Hillcrest. You've got third parties --

THE COURT: That's the question, that's the question, are they officers, agents all?

MR. CARWILE: Well, I mean, Dr. Cohlmia is not, I don't think. His lawyer who comes in is not. The court reporter who is sitting there. I don't know the answer, I haven't seen a case that goes that far and says that.

THE COURT: Probably not.

MR. CARWILE: Yeah, that's not the argument we make. We say that under Kirschstein, there's absolute immunity when people come testify at the kinds of proceedings Kirschstein recognizes and that includes expressly in that decision, boards of hospitals deciding staff privileges of physicians. So that's a separate -- that's downstream from intracorporate immunity, if you will, or intracorporate --

THE COURT: I think you've satisfied my question. I think the answer --

MR. CARWILE: I wish I had a case that said it, but I didn't find one.

THE COURT: The answer is likely no.

MR. CARWILE: I think so.

THE COURT: Yes, all right. Mr. Barkett.

MR. BARKETT: I'll try and address take first issue since it's on everyone's mind now. But certainly the fair hearing process in which Dr. Leimbach made objectively false statements that were, in fact, even denied by the physicians he alleged made them through him, Dr. Elkins that is, are not subject to intracorporate immunity.

THE COURT: I think that's clear. What about Kirschstein?

MR. BARKETT: Well, I think you have to take into context what the Oklahoma law and statutes say about the immunity provided for any sort of professional review body and actions performed by a professional review body that it's a conditional privilege under 76 Section -- O.S. Section 25 and 76 O.S. Section 28 imposes the exact same requirements of good faith and absence of malice for any privilege to apply to any actions taken by a professional review committee. So again, we're getting back into the bad faith question here and again we're talking about statements that are objectively false and objectively proven to be false.

THE COURT: Opposing counsel took the position that under Kirschstein, there's an absolute privilege. You argue it's a conditional privilege.

MR. BARKETT: I argue it's a conditional privilege under the statutes of this State, Your Honor, yes, absolutely. With regard to the statute of limitations on there, we were

directed by Judge Payne to identify in the second amended complaint and we have done so. In fact, these were all issues that were addressed in the identical arguments posed against us in the second round of motions to dismiss that this Court overruled. We specifically identified only statements that were made, defamatory statements that were made post the year preceding the filing of the date and those are the only ones that we're relying on. It is conceded that many of those statements were made in the context of medical executive committee meetings. But it's our position and I think that the circuit courts certainly take this position, and the Eleventh Circuit in particular in Bolt vs. Halifax take the position that intracorporate immunity, again you have to look at the same privileges that might be applicable under HCQIA would have to be looked at for it to be privileged under these other, under these other privileges. Otherwise, peer review and things like that and the lifting of peer review under federal law would be meaningless if they could still get away with such conduct under a defamation privilege.

It's recognized under the Federal Circuits, I believe, that hospital medical staffs are independent, separate economic entities potentially in competition with other physicians and therefore, is not an intracorporate proceeding. That's exactly what we have in this case where we have members of OHI who on the one hand they want to argue cannot be argued to have

participated and have any of their actions resulting in damage to Dr. Cohlmia because they're a separate legal entity even though they were on the medical executive staff. On the other hand, they want to say that they were participating in intracorporate activities when they made defamatory statements. You just can't rectify the two positions which is certainly consistent with the way the federal courts deal with these privilege issues. And that is if you don't -- if you're not performing these activities in good faith, that you don't have intracorporate immunity, that you don't have legal proceeding immunity. And certainly that the issues in this case show objective bad faith, objective false statements and, in fact, per se defamation because they all go toward Dr. Cohlmia's ability to practice his profession.

With regard to the tortious interference with contract. It was obviously a foreseeable result to the OHI physicians and Dr. Leimbach and we've presented the evidence of their motivation and that is that they had a deal made with Hillcrest Medical Center to develop their own Heart Hospital if they took actions against Dr. Cohlmia. Incidentally, Mr. Carwile admits that the actions boycotting Dr. Cohlmia's patients began in 2002 which preceded the letter they claim where Dr. Cohlmia terminated his relationship. And that letter clearly is terminating a business deal real estate relationship, has nothing to do with patient care. What's

admitted by OHI in this case is that they not only threatened patients with a loss, they not only stopped referring patients to Dr. Cohlmia, but they actually stopped treating their own patients who they had longstanding relations with simply because they chose to utilize Dr. Cohlmia for surgery. That's clearly patient abandonment. In fact, Dr. Kaneshige has testified that such conduct and breaching the continuity of care by a cardiologist which, again, is a component of cardiovascular surgical care is an unethical act.

THE COURT: Well, but that's not -- even if that's true, you don't have standing to assert that on their behalf, correct?

MR. BARKETT: Well, by denying, here is where it unfolds, Your Honor, is that one -- it's undisputed that one of the major reasons Dr. Cohlmia lost his privileges at Hillcrest was the allegation that he was unable to provide cardiology support for the patients he was admitting for surgery which placed the patients at risk. That was a key component for the reason Hillcrest Medical Center took Dr. Cohlmia's privileges, he could not provide cardiology support which therefore placed patients at risk. It's admitted that the reason Dr. Cohlmia could not provide cardiology support was because OHI was telling patients that if you use Dr. Cohlmia, we will not be your cardiologist.

THE COURT: Well, but they --

MR. BARKETT: They were refusing to come to the hospital and treat his patients.

THE COURT: The difficulty I'm having there is legal duty, what legal duty did they have to take those consultants?

MR. BARKETT: Well, I think there's an ethical duty. And certainly, I mean, I haven't researched the issue of an actual legal duty, but certainly patient abandonment would seem to be on its face something that would maybe borderline criminal, not simply some contractual duty. But certainly the foreseeability of their conduct was an effort to create complications for Dr. Cohlmia. They were using these patients as pawns and that's what's despicable about OHI and their scheme and plot on their own where they made this decision of themselves and in conjunction with Hillcrest Medical Center to deny Dr. Cohlmia the ability to provide quality care at Hillcrest Medical Center because of their refusal to treat patients. Not just referrals, we're talking about telling patients, existing patients that if they choose Dr. Cohlmia, they will not have cardiology support during their surgery. These aren't patients that have the opportunity to go out and find another cardiologist and reschedule. These are patients waiting in the hospital for surgery.

And so to say, to argue that that is not a foreseeable act with the intent to cause harm and interfere with patient relationships and prospective business advantage ultimately

leading to the crux of Hillcrest's denial of his privileges, which again kicked him out of the market and made it impossible for him to treat patients in the market, is simply turning a blind eye to reality in this case. And the evidence is there, it's admitted. In fact, OHI, nobody from OHI denies that it happened. Nobody from OHI suggests that it was based on any concern for Dr. Cohlmia's patient care. It's simply because they didn't like him and they wanted to not use him. I mean, to me, I just, I can't see how they can escape the reality of the situation that this was an illegal boycott.

In fact, part of the process that shows that this was all being worked in conjunction is Dr. Yousuf himself. Dr. Yousuf was brought in as a stopgap because what was happening between OHI refusing to treat the patients of Dr. Cohlmia was preventing him from providing quality services or services period to the patients at Hillcrest. They knew that this was going occur. That's when OHI, not Hillcrest, went out and found Dr. Yousuf. Rebecca Smith, an OHI physician, went out and recruited Dr. Yousuf to come to Hillcrest in 2002, at the same time they began refusing to treat Dr. Cohlmia's patients, to come in as a stopgap. And they hired him as an employee physician which was unheard of at the time, so that they had absolute control over this. I mean, there is an enormous amount of evidence that what OHI was doing was with the intent of interfering with Dr. Cohlmia's ability

to practice his contractual relations with Hillcrest Medical Center and his contractual relations with patients, all which led to further problems with his contractual relations with insurers, ultimate, ultimate eviction from the marketplace and tremendous monetary loss.

THE COURT: In terms of defamation, if you could identify particularly for me statements that are made after July 7th, 2004, that are not hearsay and are not subject to intracorporate immunity.

MR. BARKETT: Well --

THE COURT: I know you generally -- but if you will specify for me those statements that you contend fall outside of those three categories.

MR. BARKETT: Certainly Dr. Leimbach's testimony within the fair hearing process where he asserted that Dr. Cohlmia had -- his surgery stunk --

THE COURT: Right, and then the issue is does Kirschstein apply here, is it absolute or conditional privilege?

MR. BARKETT: Correct, right.

THE COURT: Okay, what next?

MR. BARKETT: Well, obviously there are many undisputed statements made and verified Dr. Decker, Dr. Giddens and Dr. Adams that were made in medical executive committee meetings. That's probably the majority of it, that we have the

absolute proof on that we've presented and they don't dispute.

THE COURT: Within the executive committee meetings?

MR. BARKETT: Correct. And again, our --

THE COURT: Okay. But they contend that's subject to intracorporate communications, right?

MR. BARKETT: They do contend that. And I have contended that that privilege is no more applicable than peer review --

THE COURT: But they're not saying it's a privilege, they're not even getting -- they're saying it's not a publication. That intracorporate immunity, as I understand it, if I'm wrong, correct me here, but they are saying it's not even a publication because these doctors are agents in that context.

MR. BARKETT: Well, it is a publication because they're not all agents and agency always is a question of fact for the jury to decide. And in this context, if they are acting in bad faith with ulterior motives, economic motives which we have, again, enormous evidence that there is. It's undisputed. That these people were acting independently for their own economic benefits and they weren't acting as an intracorporate body. And I don't think that those facts can be thrown out simply on some boilerplate claim that this was an intracorporate act. Otherwise none of these other --

THE COURT: Well, I agree it has to be analyzed

differently under defamation versus tortious interference. I mean, they are focusing, I think, on the publication aspect as to whether or not it was published outside, as I understand it.

MR. BARKETT: Well, I think that ultimately the same result really is what we're talking about here. And the fact that it would lead -- these defamatory statements made within this context were made by people that were economic competitors acting as independent agents, publication to nonplayers, nonparticipants in this scheme, leading to his National Practitioner Data Bank loss of privileges certainly is a defamatory publication --

THE COURT: Well, but in terms of those alleged defamatory statements made in these committees, to the extent that these folks are agents of the hospital, how do you get past the publication requirement?

MR. BARKETT: Well, it is -- there's third parties in there that were not coconspirators. And like I said, agency and conspiracy --

THE COURT: Are they not all hospital people?

MR. BARKETT: No, because some of them are simply sitting there listening to the evidence and making a vote. The people that were making the defamatory statements, we've alleged and we have proof, were acting in individual capacities outside this corporate environment as coconspirators with the intent of defaming him to these other people leading to his

exclusion.

THE COURT: Now, who are these other people specifically and where is that in the record?

MR. BARKETT: Well, there's certainly there's other --

THE COURT: Where is that in the record?

MR. BARKETT: Well, there's other people on the medical executive committee that are not named in this lawsuit that were not making defamatory comments.

THE COURT: Somehow we're not communicating. I mean, I'm trying to find out factually who is in these particular meetings that would not be an agent or employee of Hillcrest?

MR. BARKETT: Dr. Giddens, for one, who has testified that these statements were published to him indeed. Dr. Decker at one point I don't believe was on the medical executive committee. Dr. Adams certainly was another.

THE COURT: Well, okay, now the Adams statement was that Leimbach said -- told him that Dr. Cohlmia was litigious, is that not an opinion?

MR. BARKETT: No, I believe in his deposition he testified about some other comments made within the context of medical executive committee. I think he was isolating that comment as being one he testified to outside of what they claim to be intracorporate communication.

THE COURT: There appears to even be a difference on how the name is pronounced. Is it COHL-me-a or cohl-ME-a?

MR. BARKETT: It's COHL-me-a.

THE COURT: COHL-me-a with the accent on the first syllable.

MR. BARKETT: Correct.

THE COURT: All right.

MR. BARKETT: And in our second amended complaint, we set forth the people, including some people that were sitting in the medical executive committees, that were not participants in the conspiracy and I would have to go through these, but they're there.

THE COURT: Well, but the key is not whether you were a participant in the conspiracy allegedly, but whether you're an agent or employee of Hillcrest, right, for terms of determining publication in analyzing whether you have a defamation cause of action?

MR. BARKETT: Well, again, I think you have to look at the context of why the statements were made, what the motivation for the statements were made. And when you're talking about intracorporate, if they were engaged in some actual intracorporate enterprise, then that might be correct. Here we're talking about an illegal activity simply taking place behind closed doors under the veil of an intracorporate action. So I don't think that you can ignore the facts of bad faith, malice by the participants in the conspiracy and whether or not in that context they are acting as agents of the

corporation. And that is what the Federal Circuits, I believe, have recognized, that you can't ignore that fact. You can't ignore the motivation and the intent. And therefore, you have to, when you talk about agency or when you talk about conspiracy, that's a question that the jury has to decide.

THE COURT: All right, anything else?

MR. BARKETT: That's all.

THE COURT: And we may -- I believe I have a sentencing at 1:30; correct? And I intend to take some lunch here, so we may have to come back after the sentencing. Go ahead.

MR. CARWILE: I don't think I'll take too long, Your Honor. What's noticeably apparent, of course, is they just had a second chance to give you a statement out of the record, one statement. Just point to one line in a deposition, we've got a lot of them. Who said it, what did they say? They can't do it. Thornton talks specifically about the concept of those serving on peer review committees as agents for that purpose. It doesn't make them agents for all purposes and it doesn't make the agent liable for the torts of the principal, but in conducting peer review and sitting on those committees. And I will tell you this, there's nothing in this record that anybody went to those meetings who wasn't a member of those committees. Nothing.

THE COURT: See, that's what I was trying to find out.

MR. CARWILE: There isn't any.

THE COURT: Factually, that's theoretically possibly. It would seem to me to be illogical, but it would seem to me theoretically possible and I'm trying to find out if there are some facts on this record to indicate that.

MR. CARWILE: Nobody has testified to that. There's not a scintilla of that happening. The other thing, of course, that's absolutely true is if Giddens and Decker said the only time I ever heard it was in those meetings. That's undisputed. They didn't even dispute that in their response brief. The paragraphs where we set out Giddens' testimony and Decker's testimony. The fact is for the intracorporate publication doctrine under Magnolia as reaffirmed in the Pearle Vision case, here is what the court said. "We are unwilling to rewrite Oklahoma law. The threshold conclusion in Magnolia that intracorporate communications do not constitute publications means that liability cannot turn on the content of or the intent behind the intracorporate communication."

THE COURT: That's how I understood the law and if I'm wrong, but that's how I understood the law. Let's focus on this Leimbach statement in the fair hearing proceeding. Conditionally or absolutely privileged, I know you --

MR. CARWILE: Absolutely privileged. The language is drawn right from Kirschstein, Your Honor, because it is the body of case law that says it's absolutely privileged when a

lawyer gets up and makes a statement to the jury or the client or the witness testifies in court. It's absolutely privileged. We don't get into whether that lawsuit was brought in good faith. We don't get into whether the Judge was acting in good faith. We don't get into whether the proceeding itself. That's state law. HCQIA, whatever standard it imposes, it doesn't preempt state law. There's no argument that Kirschstein isn't the absolute personification. They say in Kirschstein this privilege is absolute which is the reason you have the privilege. You don't get into what the motivations of the witnesses, lawyers, judges, third party witnesses, all that was. So Kirschstein is an absolute privilege. It's not conditioned on anything. And to say that somehow the law overlays a good faith obligation to obtain the benefit of that privilege is without support in the case law.

THE COURT: All right, sub issues. Does that absolute privilege, assuming the privilege is absolute, apply to a proceeding by a nongovernmental agency like HMC?

MR. CARWILE: Yes.

THE COURT: Apparently Kirschstein talks about a California case Ascherman vs. Natanson. That's A-S-C-H-E-R-M-A-N vs. N-A-T-A-N-S-O-N, found at 23 Cal.App 3rd 861. But in that case, and I haven't looked at that case, it appears to have been an actual governmental entity. So the issue here is does it apply to an administrative proceeding by a

nongovernmental entity?

MR. CARWILE: It has to be a legislative or judicial or other proceeding authorized by law. I don't believe there's any restriction in Kirschstein which says it has to be a governmental agency.

THE COURT: All right. And this is a proceeding authorized by law?

MR. CARWILE: Yes.

THE COURT: All right.

MR. CARWILE: And there just isn't a -- there isn't a case which says Kirschstein doesn't apply in the context and they note that the privilege had been followed in those other states. It wasn't before them in that particular case in Kirschstein, but they didn't note it with disapproval or distinguish it or anything so that statement is absolutely privileged and Kirschstein is the last word on it in Oklahoma.

THE COURT: All right. Let's move from defamation then.

MR. CARWILE: One thing on the tortious interference. What you heard was, in the statement by counsel, motive equals causation. No, it doesn't. He basically said that. If we can show all these bad motives, we can show causation. They are separate elements. He says we've admitted threatening patients. We've never admitted that. The summary judgment briefs don't say that and the evidence we cite doesn't say

that. That's just made up out of whole cloth. To say this was patient abandonment, we didn't say we abandoned patients. And anyway, how is that loss to Dr. Cohlmia for a tort claim damage? He has to have loss of patients, he has to have his relationship with those patients damaged. No evidence of that, not a single solitary-named plaintiff. You continue to hear, there's just lots of it, Judge. There's so much, in fact, we can't tell you one.

And lastly this idea that we told patients they could never get a cardiologist. No, the undisputed fact in the record is that patients were told we will get you another cardiologist who is not from OHI. You can't even presume causation from that. There's no evidence that that wasn't followed up on. The evidence was that that was, in fact, the procedure that was followed. They were gotten another cardiologist. So we don't have a situation where -- no facts in the record that an OHI physician signs off and now the patient has to be discharged, Dr. Cohlmia can't operate on him. We don't have any of that in the record. And we didn't admit that we made the decision in 2002. I said he wrote the letter in 2003 and we made the decision, that's undisputed when it was made. I said that there was a continuing relationship between OHI and Hillcrest that goes back and predates that, which is why we can't point to one event on a causation basis, but we didn't make the decision not to treat those patients in 2002.

And that's it, Judge.

THE COURT: Yes, it was following the letter of March 3rd, 2003, correct?

MR. CARWILE: Yes.

THE COURT: All right. And as you say, ongoing?

MR. CARWILE: Well, that practice continued.

THE COURT: Right.

MR. CARWILE: It was on a continuum, yes.

THE COURT: All right, because of the nature here of the back and forth, any further argument?

MR. BREWSTER: One point, Your Honor. I would ask if the Court is considering granting intracorporate immunity to the statements that we consider to be defamatory and also the tortious interference, the basis for tortious interference, if you are considering that, I would request you certify that question to the state court, because I think it's undecided law and it will be very determinative of how this case is conducted ultimately from a evidentiary standpoint. So if Your Honor is going to apply the principle that Mr. Carwile is asking, then I would ask that we consider certifying that question.

THE COURT: All right. We're going to take a --

MR. BREWSTER: That would be the most expeditious way to do it.

THE COURT: Let me take a short recess and we'll be back here in about ten minutes.

(Recess.)

THE COURT: Be seated, please. Based upon the briefs, the evidentiary material submitted therewith, the arguments made today here on the record, the Court respectfully grants the motion number 290 of defendants Oklahoma Heart Institute, Inc., Oklahoma Heart, Inc., Wayne M. Leimbach, Jr., M.D. on Counts Five and Six.

The defamation claim presents an interesting legal issue. And although in this brief ten minutes, the Court searched for a case under 12 O.S. Section 1443.1 wherein the proceeding was not governmental or quasi governmental. The statute is clear here under subsection (a) first, the statute says "any other proceeding authorized by law". And although it raises some questions as to whether or not commercial entities can essentially petition the legislature to cloak their proceedings in privilege by going to the legislature and having those proceedings authorized by law, that's what the law says, "any other proceeding authorized by law". The motion is granted.

What is next on our agenda here, do we have any other hearings set?

MR. CARWILE: Your Honor, I think, I think you've already preset the next round of hearings, but I could be corrected on that. We don't have any conferences in front of you, no other pending motions.

THE COURT: All right. And there is the oral motion to certify, I'm going to decline to do that. I think the most efficient way here, obviously however this matter plays out, will go up on appeal, either way it seems to me. And at that juncture, you could ask the circuit to certify to the Oklahoma Supreme Court. I don't believe, in thinking about it over the last ten minutes that I've had, I don't think that is the most judicially efficient way to address it in terms of this legal issue on the application of Section 443.1. As I said, it's just been presented to me as a concept. But if there's nothing further, we will be adjourned.

(Recess.)

A TRUE AND CORRECT TRANSCRIPT.

CERTIFIED: s/ Glen R. Dorrough
Glen R. Dorrough
United States Court Reporter